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in the

Supreme Court

of the

United States

October Term 1981

THE SCHOOL BOARD OF DADE COUNTY, FLORIDA
a public corporation under the laws of
the State of Florida,

Petitioner,

vs.

THE TRAVELERS INDEMNITY COMPANY,
a Connecticut corporation,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals,
Eleventh Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Travelers objects to certain portions of the Statement of the Case as set forth by School Board primarily because it contains a number of conclusions of law, which are, of course, self-serving and not accurate statements of the underlying facts. Succinctly, the facts are as follows:

The case concerns itself with the construction of a Senior High School in Dade County, Florida. The School Board advertised for bids, and based upon those bids let a Contract for construction of that High School to International Builders of Florida, Inc., a general contractor. The Contract was in the amount of Six Million One Hundred Sixty Two Thousand ($6,162,000.00) Dollars, and Travelers issued a Performance and Payment Bond on the Project for the General Contractor, International Builders of Florida, Inc., with the School Board being the Obligee on the Bond.

During the course of construction, International Builders of Florida, Inc., defaulted on its contractual obligations and Travelers was called upon to complete the construction of the High School, which it did utilizing a different independent general contractor. During the time when Travelers was completing the Contract, delays occurred. The Travelers asserted that the delays were the fault of the Owner and its representative, the Architect. Upon completion of the Project, Travelers made claim for additional compensation and extensions of time arising from those delays. Compensation was asked in the amount of One Hundred Thirty Nine Thousand Two Hundred Fifty Four ($139,254.00) Dollars, based upon additional expenses, supervision and overhead

required because of the Owner-caused delay. (R-271-272.) Time extensions were granted, but the claim for additional compensation was denied by the School Board.

Travelers filed suit for the additional compensation in the Federal Court for the Southern District of Florida, with the claim being asserted in alternative causes of action in both contract and tort. (R-1-5.) Jurisdiction was based on Title 28, U.S.C. §1332, being a controversy in excess of Ten Thousand ($10,000.00) Dollars between parties of diverse citizenship. School Board filed its Answer and raised several Affirmative Defenses, one of which was lack of jurisdiction of the Federal Court by virtue of application of the Eleventh Amendment to the United States Constitution. (R-33-36.) The School Board moved for a Summary Judgment based on that Affirmative Defense and filed a supporting Affidavit. (R-233-250.) After argument of the Motion and deliberation, the Court entered its Order dismissing Travelers' cause of action for want of jurisdiction of the subject matter. (R-295-296.) Travelers filed an appeal to the Eleventh Circuit Court of Appeals, which entered its decision on January 22, 1982, reversing the Trial Court's Summary Judgment and remanding the cause. *Travelers Indemnity Co. v. School Board of Dade County*, 666 F.2d 505 (11th Cir. 1982). The School Board moved for a rehearing, which was denied by Order of March 12, 1982.

School Board petitioned for Writ of Certiorari, seeking to review the decision of the Court of Appeals, Eleventh Circuit, dated January 22, 1982.

SUMMARY OF ARGUMENT

Travelers argues that Petition for Writ of Certiorari filed by the School Board should not be granted. School Board has not shown the existence of any of the traditional grounds permitting the issuance of the Writ by the Supreme Court.

The School Board seeks but is unable to establish two grounds for its Petition for the Writ. Those grounds are that the Court of Appeals decided a Federal question not previously decided by the Supreme Court, and that the Court of Appeals reached a decision inconsistent with the applicable decisions of the Supreme Court. The decision below does not meet either of those criteria upon which to predicate a Petition for Writ of Certiorari.

ARGUMENT ON OBJECTION TO JURISDICTION

OBJECTION TO JURISDICTION OF THE COURT AND OPPOSITION TO PETITION FOR WRIT

The School Board fails to establish any right or privilege to have a Writ of Certiorari issue in this cause. Under Supreme Court Rules as to jurisdiction on Writ of Certiorari (Title 28, U.S.C., Supreme Court of the United States, Revised Rules No. 17) a review on a Writ of Certiorari is not a matter of right. It is a matter of discretion for which the Rules lay out certain indications as to the type of reasons to be considered by the Court.

The School Board seeks to utilize two suggested grounds under Rule 17 to permit a discretionary review on Writ of Certiorari. Those grounds are:

(1) That the decision of the Eleventh Circuit decided an important question of Federal law not settled by the Supreme Court, and which should be settled by this Court.

(2) That the decision of the Eleventh Circuit decided a Federal question in a manner conflicting with the decisions of the Supreme Court.

It is noted that the School Board's two asserted grounds for issuance of the Writ are inconsistent. The matter at issue has either been decided or not by this Court. If it has been decided then the School Board's first ground is insufficient. If it has not been decided, then the School Board's second ground is non-existent.

In fact, neither of the School Board's contentions are correct.

First, the School Board asserts that an important question of Federal Law is unresolved and ought to be resolved by this Court. That argument fails on two grounds. Initially, the School Board makes no attempt to show why the matter is of great importance. It merely asserts that it is of great importance. The real issue has nothing to do with the State's protection under the Eleventh Amendment to the United States Constitution. The real issue is whether contracting parties ought to be allowed to seek redress for damages against one another in a Court of law of the United States when the jurisdictional requirements of Title 28, U.S.C., §1332 have been met. The School Board seeks protection under the aegis of the Eleventh Amendment in a most artificial fashion. It strains logic to reach the School Board's conclusion. That this question is an important question in Federal Law is extremely doubtful.

Secondly and more importantly, the Court is not presented with an issue here that has not previously been decided by the Supreme Court. This Court has put the issue snugly to bed with its opinion in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 273, 50 L.Ed.2d 471, 97 S.Ct. 568. The issue has been decided. School boards, like municipalities, are not alter egos of the State. They cannot claim protection under the Eleventh Amendment of the United States Constitution.

Mt. Healthy dealt with the School Board in the State of Ohio. They sought immunity under the Eleventh Amendment also. The factual situation was very analogous to the one in the case at bar. The following language by Mr. Justice Rehnquist in the *Mt. Healthy* decision is of interest here:

> Petitioner [School Board] is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education, Ohio Rev. Code Ann. §3301.07 (Page 1972 and Supp. 1975), and receives a significant amount of money from the State. Ohio Rev. Code Ann. §3317 (Page 1972 and Supp. 1975). But local school boards have extensive powers to issue bonds, Ohio Rev. Code Ann. §133.27 (Page 1969), and to levy taxes within certain restrictions of state law. Ohio Rev. Code Ann. §§ 5705.02, 5705.03, 5705.192, 5705.194 (Page 1973 and Supp. 1975). On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.
> 492 U.S. at 280, 291, 97 S.Ct. at 572, 573.

It is simply not true that the issue before this Court has not been decided. Not only was it decided in *Mt. Healthy*, it was decided most explicitly with respect to school boards in the State of Florida (as is the case here). In the case of *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976), the Fifth

Circuit, addressing the issue of Florida school boards and the Eleventh Amendment said:

> Our analysis of the nature of Florida school board is the context of determining their similarity to municipalities is sufficient to convince us that they are not the type of entities which are sheltered by the Eleventh Amendment.
> 534 F.2d at 656.

The issue has previously been decided by both this Court and the Fifth Circuit Court of Appeals and the issue has been decided in favor of The Travelers' position taken in the case now under consideration. There is no important question of Federal Law undecided by this Court.

The School Board says in its Petition for Writ of Certiorari that the Court of Appeals below decided two important questions of Federal Law which had not been, but should be, settled by this Court. That is not true. No new question of Federal Law was decided by the Court of Appeals. What the Circuit Court below *did* do was to distinguish this case from *Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974). The *Edelman* case is heavily relied upon by the School Board, nearly to the exclusion of other authority. The reliance is misplaced, as the Circuit Court of Appeals points out when it elaborates on the distinctions between this case and the *Edelman* case. The first distinction is that the present case is not based upon breach of legal duty by a State official. In Edelman, it clearly was the conduct of a State official that was in issue. The School Board simply cannot escape that distinction.

The second distinction that the Court below makes with respect to the *Edelman* case is that Eleventh Amendment protection is available only if the Satisfaction of the Judgment is to be paid out of State funds under all circumstances. The Court of appeals rightly found that the record did not reflect that to be the case here. That is not even the contention of the School Board. It acknowledges that it has independent available funds. (R. Vol. III, page 9.) The School Board well knows that the monies to satisfy this Judgment, if obtained, need not necessarily come from "State funds". The School Board wants to reach that conclusion, in fact needs to reach that conclusion, to invoke the protection that it seeks but does not deserve.

In conclusion on this point, the Court below did not decide new issues as to important questions of Federal Law which had not been decided by the Supreme Court. It did make valid distinctions between this case and the *Edelman* case upon which the School Board needs to but cannot rely.

The other ground upon which School Board bases its Petition for Writ of Certiorari is that the Eleventh Circuit Court of Appeals below decided a Federal question in conflict with the decisions of this Court. Once again, School Board relies on *Edelman* to support this proposition. The Circuit Court's decision in *Travelers Indemnity Co. v. School Board of Dade County, supra,* is not contrary to or inconsistent with the decision in *Edelman v. Jordan, supra.* As previously stated, the Circuit Court distinguished *Edelman* on valid grounds. Also, Travelers points out that *Edelman* itself recognizes rather clearly that a county and its governing bodies are not a State for the purposes of the Eleventh

Amendment. The *Edelman* decision by way of footnote points out that bodies such as school boards can be subjected to the constitutional constraints of the Fourteenth Amendment, and at the same time not qualify as the "State" in an attempt to invoke Eleventh Amendment protection. The Court said in part:

> . . . a county does not occupy the same position as a State for purposes of the Eleventh Amendment. (Cites omitted.) The fact that the county policies executed by the county officials in *Griffin* were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long-established rule that while county action is generally state action for the purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for the purposes of the Eleventh Amendment. 415 U.S. at 668, Footnote 12, 94 S.Ct. at 1358, Footnote 12.

The decision of the Eleventh Circuit in *Travelers Indemnity Co. v. School Board of Dade County*, below, is not inconsistent with *Edelman*. It is, in fact, consistent with the premises laid down in *Edelman*. In *Edelman* the Court found for invoking protection of the Eleventh Amendment. In *Travelers Indemnity Co. v. School Board of Dade County* the Court below found against invoking Eleventh Amendment protection. This does not make the decisions inconsistent. The circumstances are not the same. There are distinctions to be made. The Circuit Court below made those distinctions, and properly so.

There are no reasonable grounds for invoking the Certiorari jurisdiction of the Supreme Court of the United States in this case. The decision below did not involve issues which concerned important Federal questions unresolved before this Court and the decision below did not decide a Federal question in a manner conflicting with the applicable decisions of this Court.

The School Board in its Brief charges that the Court below is plowing metaphoric furrows in a virgin field. Not so. This land has been plowed and borne fruit, which the School Board finds bitter to the taste.

CONCLUSION

The School Board's Petition for a Writ of Certiorari should be denied. There are no special and important reasons for granting such a Petition, and the School Board has not demonstrated that it meets any of the ordinary criteria to be considered by this Court in the exercise of its discretionary power to grant Petitions for Writs of Certiorari. The decision of the Eleventh Circuit Court of Appeals should be sustained and the Petition for Writ of Certiorari denied.

Respectfully submitted

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